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4 LLOYD B.,  
5 Plaintiff,  
6 v.  
7 ANDREW SAUL,  
8 Defendant.

9 Case No. 19-cv-07717-DMR  
10  
11

**ORDER ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT**

Re: Dkt. Nos. 13, 14

12 Plaintiff Lloyd B. moves for summary judgment to reverse the Commissioner of the Social  
13 Security Administration's (the "Commissioner's") final administrative decision, which found  
14 Plaintiff not disabled and therefore denied him application for benefits under Title II of the Social  
15 Security Act, 42 U.S.C. § 401 *et seq.* [Docket Nos. 13 ("Pltf. Mot."), 17 ("Reply").] The  
16 Commissioner cross-moves to affirm. [Docket No. 14 ("Def. Mot.").] For the reasons stated below,  
17 the court grants Plaintiff's motion, denies the Commissioner's cross-motion, and remands the case  
18 for further administrative proceedings.

19 **I. PROCEDURAL HISTORY**

20 Plaintiff filed an application for Social Security Disability Insurance ("SSDI") benefits on  
21 January 29, 2016, alleging a disability onset date of April 9, 2012. Administrative Record ("A.R.")  
22 172-75. The application was initially denied on September 1, 2016 and again on reconsideration on  
23 November 17, 2016. A.R. 108-11, 113-17. An Administrative Law Judge ("ALJ") held a hearing  
24 on January 5, 2018 and issued an unfavorable decision on October 17, 2018. A.R. 12-29. The ALJ  
25 determined that Plaintiff has the following severe impairments: tinnitus of both ears; multiple pelvic  
26 fractures; mild degenerative joint disease of the left hip with osteophytosis; degenerative joint  
27 disease of the right hip with joint space narrowing osteophytosis; mild degenerative changes of the  
28 lumbar spine, including mild L4-L5 borderline L3-L4 level central stenosis; mild degeneration of

1 the thoracic spine; and mild to severe conductive hearing loss, worse in the right than left. A.R. 17.

2 The ALJ found that Plaintiff retains the following residual functional capacity (RFC):

3 [T]o perform sedentary work as defined in 20 CFR 404.1567(a)  
4 except the individual is able to frequently lift/carry 10 pounds and  
5 occasionally lift/carry 20 pounds; sit for up to 6 hours (stand for 5  
6 minutes after every hour of sitting during which time the person  
7 would be off task), stand or walk 2 hours in an 8-hour workday with  
normal breaks; the individual should never climb ladders, ropes or  
scaffolds; able to occasionally climb ramps/stairs; the individual can  
occasionally stoop, kneel, balance and rarely crawl, crouch, and  
kneel; and no work with dangerous machinery.

8 A.R. 18. Relying on the opinion of a vocational expert (“V.E.”) who testified that an individual  
9 with such an RFC could perform other jobs existing in the economy, including working as a  
10 document preparer, addresser, and stuffer, the ALJ concluded that Plaintiff is not disabled.

11 After the Appeals Council denied review, Plaintiff sought review in this court pursuant to  
12 42 U.S.C. § 405(g).

## 13 II. STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this court has the authority to review a decision by the  
15 Commissioner denying a claimant disability benefits. “This court may set aside the Commissioner’s  
16 denial of disability insurance benefits when the ALJ’s findings are based on legal error or are not  
17 supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180 F.3d 1094, 1097  
18 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the record that could  
19 lead a reasonable mind to accept a conclusion regarding disability status. *See Richardson v. Perales*,  
20 402 U.S. 389, 401 (1971). It is more than a mere scintilla, but less than a preponderance. *See Saelee*  
21 *v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted). When performing this  
22 analysis, the court must “consider the entire record as a whole and may not affirm simply by isolating  
23 a specific quantum of supporting evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th  
24 Cir. 2006) (citation and quotation marks omitted).

25 If the evidence reasonably could support two conclusions, the court “may not substitute its  
26 judgment for that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112  
27 F.3d 1064, 1066 (9th Cir. 1997) (citation omitted). “Finally, the court will not reverse an ALJ’s  
28 decision for harmless error, which exists when it is clear from the record that the ALJ’s error was

1 inconsequential to the ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035,  
2 1038 (9th Cir. 2008) (citations and internal quotation marks omitted).

3 The court has read and considered the entire record in this case. For the purposes of brevity,  
4 the court cites only the facts that are relevant to its decision.

### 5 III. DISCUSSION

6 Plaintiff argues that the ALJ erred (1) in assigning too little weight to the opinion of his  
7 treating orthopedic physician, Eric Fulkerson, M.D., and (2) in discounting Plaintiff’s subjective  
8 pain testimony.

#### 9 A. Weighing of the Medical Opinions

##### 10 1. Legal Standard

11 Courts employ a hierarchy of deference to medical opinions based on the relation of the  
12 doctor to the patient. Namely, courts distinguish between three types of physicians: those who  
13 treat the claimant (“treating physicians”) and two categories of “nontreating physicians,” those  
14 who examine but do not treat the claimant (“examining physicians”) and those who neither  
15 examine nor treat the claimant (“non-examining physicians”). *See Lester v. Chater*, 81 F.3d 821,  
16 830 (9th Cir. 1995). A treating physician’s opinion is entitled to more weight than an examining  
17 physician’s opinion, and an examining physician’s opinion is entitled to more weight than a non-  
18 examining physician’s opinion. *Id.*

19 The Social Security Act tasks the ALJ with determining credibility of medical testimony and  
20 resolving conflicting evidence and ambiguities. *Reddick*, 157 F.3d at 722. A treating physician’s  
21 opinion, while entitled to more weight, is not necessarily conclusive. *Magallanes v. Bowen*, 881  
22 F.2d 747, 751 (9th Cir. 1989) (citation omitted). To reject the opinion of an uncontradicted treating  
23 physician, an ALJ must provide “clear and convincing reasons.” *Lester*, 81 F.3d at 830; *see, e.g.*,  
24 *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995) (affirming rejection of examining  
25 psychologist’s functional assessment which conflicted with his own written report and test results);  
26 see also 20 C.F.R. § 416.927(d)(2); SSR 96-2p, 1996 WL 374188 (July 2, 1996). If another doctor  
27 contradicts a treating physician, the ALJ must provide “specific and legitimate reasons” supported  
28 by substantial evidence to discount the treating physician’s opinion. *Lester*, 81 F.3d at 830. The

1 ALJ meets this burden “by setting out a detailed and thorough summary of the facts and conflicting  
2 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick*, 157 F.3d at 725  
3 (citation omitted). “[B]road and vague” reasons do not suffice. *McAllister v. Sullivan*, 888 F.2d  
4 599, 602 (9th Cir. 1989). This same standard applies to the rejection of an examining physician’s  
5 opinion as well. *Lester*, 81 F.3d at 830-31. A non-examining physician’s opinion alone cannot  
6 constitute substantial evidence to reject the opinion of an examining or treating physician, *Pitzer v.*  
7 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir.  
8 1984), though a non-examining physician’s opinion may be persuasive when supported by other  
9 factors. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (noting that opinion by  
10 “non-examining medical expert . . . may constitute substantial evidence when it is consistent with  
11 other independent evidence in the record”); *Magallanes*, 881 F.2d at 751-55 (upholding rejection of  
12 treating physician’s opinion given contradictory laboratory test results, reports from examining  
13 physicians, and testimony from claimant). An ALJ “may reject the opinion of a non-examining  
14 physician by reference to specific evidence in the medical record.” *Sousa v. Callahan*, 143 F.3d  
15 1240, 1244 (9th Cir. 1998). An opinion that is more consistent with the record as a whole generally  
16 carries more persuasiveness. See 20 C.F.R. § 416.927(c)(4).

## 17           2.       Analysis

18       On April 9, 2012, Plaintiff suffered injuries after falling approximately 25 feet down an  
19 elevator shaft. A.R. 285-86. A CT scan of his pelvis revealed a posterior sacral fracture on the left  
20 hemisacrum and superior and inferior pubic rami fractures on the left side. A.R. 286. He was  
21 diagnosed with a pelvic ring injury. A.R. 288. On April 11, 2012, orthopedic physician Dr. Eric  
22 Fulkerson treated the pelvic ring injury with anterior, external fixation and left iliosacral screw  
23 insertion. A.R. 290.

24       After the operation, Dr. Fulkerson continued to treat Plaintiff through October 2014. A.R.  
25 449-549. At the six-week post-op examination, Plaintiff told Dr. Fulkerson that he had throbbing  
26 bilateral deep hip pain for 1-2 weeks with increased difficulty sleeping and getting out of bed. A.R.  
27 516. He also reported his back occasionally “locks up” after his injury. A.R. 516. He had been  
28 taking Norco for the pain, but the medications did not seem to work very well for the past week or

1 two. A.R. 516. Dr. Fulkerson noted that X-ray imaging showed additional healing of Plaintiff's  
2 pubic and sacral fractures, but he prescribed Percocet based on Plaintiff's complaints of increased  
3 pain. A.R. 516. Over the next several months, Dr. Fulkerson continued to record abnormal findings,  
4 including decreased hip flexion due to pain, muscle tightness, an antalgic gait, decreased mobility,  
5 and significant spasms in Plaintiff's lower back. A.R. 449, 456, 516. An MRI of Plaintiff's lumbar  
6 spine taken June 20, 2012 revealed mild to moderate abnormalities, but he was not recommended  
7 for spinal surgery. A.R. 355-56, 457.

8 Plaintiff attempted to return to his previous work on October 15, 2012 with work limitations,  
9 including working no more than 2 hours a day; no prolonged bending, lifting, or squatting; and  
10 frequent position changes every 15 minutes. A.R. 449. Within days of returning to work, Plaintiff  
11 experienced "significant functional difficulties particularly with any long periods of standing, sitting  
12 or walking." A.R. 532. Dr. Fulkerson noted that Plaintiff still walked with an antalgic gait and  
13 appeared uncomfortable while sitting. A.R. 532. He recommended that Plaintiff continue physical  
14 therapy and connect with pain management for consideration of epidural injections. A.R. 532. He  
15 also extended Plaintiff's estimated return to work date for two months. A.R. 532. On November  
16 29, 2012, Dr. Fulkerson again extended Plaintiff's estimated return to work date for another month  
17 (to January 30, 2013) to allow for injections and continued physical therapy. A.R. 537. However,  
18 on January 10, 2013, Dr. Fulkerson wrote that he "[did] not think [Plaintiff] will be able to return to  
19 his full-work duties" and "due to his difficulty with sitting, standing, or performing any physical  
20 activity for an extended period of time, he is unable to perform any significant work duties." A.R.  
21 509.

22 Plaintiff received an epidural steroid injection on January 15, 2013 and had significant  
23 improvement in his symptoms, with decreased sensation of numbness and tingling down his left  
24 lower extremity. A.R. 511, 543. However, his symptoms began to recur in about a month. A.R.  
25 543. He planned to follow up with another injection and continue physical therapy but Dr. Fulkerson  
26 noted that given Plaintiff's current progression, it would "be some time before [Plaintiff] is able to  
27 return to work duties as he was unable to tolerate even limited duties previously." A.R. 544. On  
28 May 31, 2013, Plaintiff told Dr. Fulkerson that his back pain persists and that he was scheduled for

1 another lumbar injection. A.R. 463. Dr. Fulkerson opined that “[g]iven [Plaintiff’s] persistent  
2 symptoms and high-energy nature of his injury, there is significant probability that he will have  
3 long-term residual disability . . .” A.R. 463.

4 In August 2013, Plaintiff again told Dr. Fulkerson that he was interested in returning to work  
5 on a limited duty basis. A.R. 538. Dr. Fulkerson approved limited duty with work restrictions,  
6 including working only four hours a day, four days a week, to allow for ongoing physical therapy;  
7 no lifting over 25 pounds; no prolonged bending, lifting, stooping, squatting; and frequent position  
8 changes of 10 minutes every hour. A.R. 452, 483. However, no limited duty work was available at  
9 Plaintiff’s prior employment at that time. A.R. 452. Subsequent evaluations continued to show  
10 pain, back spasms, and an antalgic gait. A.R. 451, 493, 534. By January 8, 2014, Plaintiff planned  
11 to proceed with modified work duty, which would include lifting less than 20lbs and working no  
12 more than four hours per day, four days a week. A.R. 493. Throughout the remainder of his  
13 treatment by Dr. Fulkerson, Plaintiff continued to experience significant pain and back spasms. A.R.  
14 513, 515, 520, 523, 528, 533. In October 2014, Dr. Fulkerson wrote that Plaintiff “unfortunately  
15 has no significant improvement” despite maintaining his medication regimen of anti-inflammatories  
16 and occasionally Norco, as well as home exercises. A.R. 533. Dr. Fulkerson planned to refer him  
17 for repeated steroid injections but noted that “this may be a temporary measure.” A.R. 533.

18 The ALJ assigned partial weight to Dr. Fulkerson’s various opinions on Plaintiff’s work-  
19 related limitations. A.R. 22. With respect to Dr. Fulkerson’s August 2013 restrictions, the ALJ said  
20 that the lifting, bending, stooping, squatting, and frequent position changes were all accounted for  
21 in the assessed RFC. A.R. 21. The ALJ did not credit the limitation restricting Plaintiff to working  
22 only four hours a day because “subsequent records do[] not support such restrictive limitations.”  
23 A.R. 21. The ALJ also stated that although Dr. Fulkerson’s records showed that Plaintiff had  
24 “significant limitations,” there was also “increased functionality over time . . . to the point where  
25 [Plaintiff] is now capable of performing a restrictive range of light work.” A.R. 22. Because Dr.  
26 Fulkerson’s opinions are contradicted by the opinions of other physicians in the record, all of whom  
27 assigned less restrictive limitations, the ALJ was required to provide “specific and legitimate  
28 reasons” supported by substantial evidence to discount Dr. Fulkerson’s opinions. *Lester*, 81 F.3d at

1 830.

2 Plaintiff argues that the ALJ erred in assigning too little weight to Dr. Fulkerson's opinions  
3 because the ALJ did not actually include all the restrictions in the portions of Dr. Fulkerson's  
4 opinions the ALJ purported to accept. Specifically, on August 9, 2013, Dr. Fulkerson approved  
5 Plaintiff returning to modified duty with some limitations, including "[f]requent position change 10  
6 min per 1 hrs." A.R. 483. The ALJ stated that he "accounted for" this limitation on position changes  
7 in the RFC he assessed. *See* A.R. 21 ("[F]requent position changes, 10 minutes per 1 hour, . . . is  
8 accounted for in the above residual functional capacity."). The ALJ's representation is confusing  
9 because the RFC actually limits Plaintiff to standing for 5 minutes per hour instead of the 10 minutes  
10 in Dr. Fulkerson's opinion. A.R. 18. Since the ALJ did not provide any reason to reject Dr.  
11 Fulkerson's opinion about the amount of time Plaintiff would need to make postural changes, the  
12 ALJ's failure to account for this discrepancy was an error. Nor does the error appear to be harmless.  
13 In discussing the position change limitation during the hearing, the VE stated that "[t]he limit I use  
14 is about 48 minutes," referring to the total amount of time in a day someone could be off-task for  
15 postural changes and still perform the identified jobs. *See* A.R. 68-69. While the ALJ's limitation  
16 of 5 minutes per hour falls under this limit (40 minutes in an 8-hour workday), Dr. Fulkerson's  
17 limitation of 10 minutes per hour would not (80 minutes in an 8-hour workday). Thus, if the ALJ  
18 had actually accounted for Dr. Fulkerson's limitation regarding postural changes, Plaintiff would be  
19 precluded from performing the jobs identified by the VE. The ALJ's unexplained failure to credit  
20 Dr. Fulkerson's opinion on this point is therefore not harmless.

21 Plaintiff also argues that the ALJ purported to reject Dr. Fulkerson's opinions on the basis  
22 that Plaintiff's conditions improved over time but the ALJ did not identify any clinical findings  
23 showing improvement. The ALJ's reasoning on this point is somewhat convoluted. In support of  
24 his finding that Plaintiff had "increased functionality over time," the ALJ cited to the medical  
25 opinions of consultative examiner Calvin Pon, M.D. and worker's compensation examiner Khosrow  
26 Tabaddor, M.D. *See* A.R. 22. However, the ALJ did not identify any specific portions of those  
27 opinions that indicate increased functionality, such as greater muscle strength, better range of  
28 motion, decreased spasms, or better tolerance for physical activity. Instead, it appears that the ALJ

1 used the less restrictive RFC in those opinions as evidence of increased functioning. This reasoning  
2 is circular because the ALJ then credited Dr. Pon's and Dr. Tabaddor's opinions on the basis that  
3 they are consistent with the evidence of increased functionality.<sup>1</sup> See A.R. 22. Because the ALJ did  
4 not identify any evidence showing that Plaintiff's functionality increased over time, he did not offer  
5 specific and legitimate reasons to reject Dr. Fulkerson's opinions.

6 For these reasons, the ALJ erred in partially discounting Dr. Fulkerson's opinions.

7 **B. Credibility**

8 **1. Legal Standard**

9 In general, credibility determinations are the province of the ALJ. "It is the ALJ's role to  
10 resolve evidentiary conflicts. If there is more than one rational interpretation of the evidence, the  
11 ALJ's conclusion must be upheld." *Allen v. Sec'y of Health & Human Servs.*, 726 F.2d 1470, 1473  
12 (9th Cir. 1984) (citations omitted). An ALJ is not "required to believe every allegation of disabling  
13 pain" or other nonexertional impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (citing  
14 42 U.S.C. § 423(d)(5)(A)). However, if an ALJ discredits a claimant's subjective symptom  
15 testimony, the ALJ must articulate specific reasons for doing so. *Greger v. Barnhart*, 464 F.3d 968,  
16 972 (9th Cir. 2006). In evaluating a claimant's credibility, the ALJ cannot rely on general findings,  
17 but "must specifically identify what testimony is credible and what evidence undermines the  
18 claimant's complaints." *Id.* at 972 (quotations omitted); *see also Thomas v. Barnhart*, 278 F.3d 947,  
19 958 (9th Cir. 2002) (stating that an ALJ must articulate reasons that are "sufficiently specific to  
20 permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony"). The

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22 \_\_\_\_\_  
23 <sup>1</sup> In his motion, the Commissioner asserts that Dr. Fulkerson's own progress reports record  
24 improvement. Def. Mot. at 9. The only record he cites in support of that statement is a medical  
25 record dated May 31, 2013 in which Dr. Fulkerson acknowledges that Plaintiff's hip stiffness has  
26 improved. See A.R. 463. However, that record also states that Plaintiff's "back pain persists" and  
27 that he continues to need lumbar injections for the pain. A.R. 463. Dr. Fulkerson also wrote, "Given  
28 [Plaintiff's] persistent symptoms and [the] high-energy nature of his injury, there is a significant  
probability that he will have long-term residual disability . . ." A.R. 463. Thus, this record is not  
evidence of significant improvement. In any case, the ALJ did not actually cite this record as  
evidence of improvement, and so the Commissioner's argument is impermissible post-hoc  
rationalization. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009)  
("Long-standing principles of administrative law require [this court] to review the ALJ's decision  
based on the reasoning and factual findings offered by the ALJ—not post hoc rationalizations that  
attempt to intuit what the adjudicator may have been thinking." (citation omitted)).

1 ALJ may consider “ordinary techniques of credibility evaluation,” including the claimant’s  
2 reputation for truthfulness and inconsistencies in testimony, and may also consider a claimant’s  
3 daily activities, and “unexplained or inadequately explained failure to seek treatment or to follow a  
4 prescribed course of treatment.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).

5 The determination of whether or not to accept a claimant’s testimony regarding subjective  
6 symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281  
7 (citations omitted). First, the ALJ must determine whether or not there is a medically determinable  
8 impairment that reasonably could be expected to cause the claimant’s symptoms. 20 C.F.R. §§  
9 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. Once a claimant produces medical evidence  
10 of an underlying impairment, the ALJ may not discredit the claimant’s testimony as to the severity  
11 of symptoms “based solely on a lack of objective medical evidence to fully corroborate the alleged  
12 severity of” the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc) (citation  
13 omitted). Absent affirmative evidence that the claimant is malingering, the ALJ must provide  
14 “specific, clear and convincing” reasons for rejecting the claimant’s testimony. *Vasquez v. Astrue*,  
15 572 F.3d 586, 591 (9th Cir. 2009). The Ninth Circuit has reaffirmed the “specific, clear and  
16 convincing” standard applicable to review of an ALJ’s decision to reject a claimant’s testimony.  
17 See *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014).

## 18           **2.         Analysis**

19           The ALJ partially discredited Plaintiff’s testimony on the grounds that (1) Plaintiff reported  
20 that he is able to lift heavy things; (2) Plaintiff has been working as a Lyft driver on a part-time  
21 basis; (3) Plaintiff was denied pain management because he failed to complete physical therapy; and  
22 (4) Plaintiff’s MRIs and x-rays show only mild to moderate degenerative changes. A.R. 19.

23           With respect to the first reason, the ALJ did not cite any testimony or record in which  
24 Plaintiff reported being able to lift heavy things following his injury. In the hearing, Plaintiff  
25 testified that he sometimes must lift bags and other luggage while he is driving for Lyft. A.R. 38.  
26 However, he clarified that he lifts at most 10 to 20 pounds at a time and “if it’s too heavy, I ask [the  
27 passenger] to do it.” A.R. 38. Plaintiff’s reported lifting limitations are supported throughout the  
28 record. See A.R. 203, 204, 449, 493, 510, 559. Thus, the ALJ’s vague reference to “heavy” lifting

1 is not a clear and convincing reason to discredit Plaintiff's pain testimony.

2 Second, the ALJ cited Plaintiff's part-time work driving for Lyft as a reason to discredit his  
3 pain testimony. A.R. 19. However, Plaintiff testified that he only drives for two to three hours a  
4 day, depending on his level of pain. A.R. 35. He starts early in the morning to "limit [his] exposure  
5 to traffic" so that he does not have to drive for long periods of time. A.R. 35. Most of his rides are  
6 between one and ten miles long. A.R. 36. He can choose when he starts and stops working. A.R.  
7 36. Even with limited driving, his pain increases throughout the day until he "literally . . . can't take  
8 it anymore" and has to go home to lay down or use his inversion table. A.R. 45. On a typical day,  
9 his pain starts at about 2-4 on a scale of 10 and by the time he drives for two or three hours, his pain  
10 reaches 8-10 out of 10. A.R. 45-46. The ALJ did not explain how Plaintiff's testimony that he  
11 drives two to three hours per day with increasing pain is inconsistent with any of Plaintiff's reported  
12 limitations. The ALJ also did not explain how Plaintiff's part-time driving work, for which he can  
13 choose his own hours and stop at will, indicates that he would be able to transition to full-time,  
14 scheduled employment. Accordingly, Plaintiff's work for Lyft is not a clear and convincing reason  
15 to discredit his pain testimony.

16 Third, the ALJ points out that Plaintiff was twice denied pain management on the basis that  
17 he had not been doing physical therapy. A.R. 19; *see* A.R. 648, 657. Plaintiff completed extensive  
18 physical therapy shortly after his injury in April 2012. By April 2013, Plaintiff had completed 24  
19 physical therapy sessions. A.R. 416. At that time, he felt that he had "hit a plateau" in regard to  
20 pain on his left side and experienced only short-term relief after physical therapy. A.R. 416. He  
21 also continued to have significant restrictions in his activities of daily living, as he was limited to  
22 sitting for 30 minutes to 1 hour at a time, could walk for 30 minutes, and had a very difficult time  
23 using stairs. A.R. 416. His range of motion in his lumbar spine had improved only 5% since his  
24 initial evaluation. A.R. 416. Plaintiff completed at least 11 more physical therapy sessions by  
25 November 2013. A.R. 432. At the final recorded session on November 8, 2013, he reported his  
26 pain level at a 7-8/10 and was "unable to tolerate exercises/stretches" due to "high pain levels."  
27 A.R. 432. The record shows that Plaintiff continued with physical therapy through at least June 20,  
28 2014. A.R. 520. On June 22, 2017, Plaintiff was referred to physical therapy again. A.R. 637. He

1 did not show up for a scheduled session on July 24, 2017. A.R. 639. He was later referred to pain  
2 management but was denied in October 2017 because he was not in physical therapy. A.R. 648.  
3 He was denied a pain consult again in November 2017 on the same basis. A.R. 657. Plaintiff  
4 successfully restarted physical therapy in December 2017, although he completed only two sessions  
5 before the hearing on January 5, 2018. A.R. 19, 683.

6 The Ninth Circuit has held that, in assessing a claimant's credibility, an ALJ may consider  
7 "unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of  
8 treatment." *Smolen*, 80 F.3d at 1284. A claimant's statements "may be less credible if the level or  
9 frequency of treatment is inconsistent with the level of complaints, or if the medical reports or  
10 records show that the individual is not following the treatment as prescribed and there are no good  
11 reasons for this failure." SSR 96-7p; *see also Molina*, 674 F.3d at 1113 (holding that the ALJ did  
12 not err in discounting a claimant's credibility where there was "no medical evidence that [the  
13 claimant's] resistance was attributable to her mental impairment than her own personal preference").

14 In this case, the record shows that Plaintiff was referred to re-start physical therapy in August  
15 2017 but he did not resume his sessions until December 2017. A.R. 644, 683. However, the record  
16 as a whole does not support the ALJ's conclusion that Plaintiff inexplicably failed to seek treatment  
17 for his conditions. Plaintiff successfully enrolled in physical therapy for at least two years following  
18 his injury despite limited improvement and continued high levels of pain. A.R. 432, 450. By  
19 October 2014, he reported that he was still doing home exercises but "unfortunately has no  
20 significant improvement." A.R. 533. The most recent evidence from 2017 show that Plaintiff  
21 sought and received numerous medical treatments, including repeated epidural injections, a  
22 lumbosacral support, opioid pain relievers, and medications to treat spasms and inflammation. A.R.  
23 40, 637, 640, 669. While Plaintiff's failure to seek *any* medical treatment might be a reason to  
24 discredit his reported pain symptoms, his delay in seeking a specific treatment is not, given that he  
25 received other significant treatments in the interim and had marginal results with physical therapy  
26 in the past. Accordingly, Plaintiff's delay in re-starting physical therapy is not a clear and  
27 convincing reason to discredit his subjective pain testimony.

Finally, the ALJ stated that Plaintiff's MRI and x-ray results show only "mild to moderate degenerative changes," which is inconsistent with his reported pain levels. A.R. 19. The ALJ is correct that the imaging results generally showed mild to moderate abnormalities. *See* A.R. 355-56, 457, 621, 624, 627, 631, 637, 648. However, an ALJ may not discredit a claimant's testimony solely on the basis that the claimant's reported symptoms suggest more impairment than shown by objective medical findings. *See* 20 C.F.R. § 404.1529(c)(2) ("[W]e will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements."). Because the court already rejected the ALJ's other reasons to discredit Plaintiff's testimony, the severity of Plaintiff's symptoms compared to the mild to moderate abnormalities found in his imaging results is not a clear and convincing reason on its own to reject Plaintiff's subjective pain testimony.

Accordingly, the ALJ erred in making a partially adverse credibility finding.

#### IV. CONCLUSION

For the reasons stated above, Plaintiff's motion for summary judgment is granted. The Clerk shall enter judgment for Plaintiff and against the Commissioner and remand this case for further proceedings.

**IT IS SO ORDERED.**

Dated: April 27, 2021

